

A **Public Prosecutor v Sim Ah Ba & Anor**

HIGH COURT (PENANG) — CRIMINAL TRIAL NO 47-15-94
JEFFREY TAN JC
31 JULY 1995

B **Criminal Law** — *Dangerous Drugs Act (Malaysia)* — s 37(b) — *Drug trafficking — Presumption of occupation of premises — Whether person who has care or management deemed to have occupation of premises — What amounts to care and management*

Criminal Procedure — *Charge — Accused persons jointly charged — Accused persons jointly charged in furtherance of common intention — Distinction — Criminal*

C *Procedure Code (FMS Cap 6) s 170 — Penal Code (FMS Cap 45) s 34*

Criminal Procedure — *Trial — Close of prosecution's case — Standard of proof — Whether standard is beyond reasonable doubt*

D **Evidence** — *Standard of proof — Statutory presumptions — Rebutting statutory presumptions — Standard on the defendant — Whether standard is on balance of probabilities*

Evidence — *Witnesses — Prosecution's discretion as to choice of witnesses — Duty of prosecution to offer such witnesses to defence*

E **Words and Phrases** — *'Possession' — Dangerous Drugs Act 1952 s 37(d)*

F Both the accused persons in this case were charged with the offence of drug trafficking under s 39B of the Dangerous Drugs Act 1952 ('the DDA 1952'). At the time of his arrest the first accused ('A1') was the sole occupant in a car wherein three paper packages containing orange granular/powdery substance were found along with two plastic packets containing granular/powdery substance which was suspected to be heroin. All the granular/powdery substances were taken into custody by the police officer ('SP3') who headed the arrest party.

G When the arrest party together with A1 proceeded to a house they found the second accused ('A2') standing outside the house with a young child. When SP3 alighted from A1's car, A2 immediately went into the house, locked the front iron grille door and closed the front bedroom door. Subsequently, A2 and her children were arrested. Among the issues for consideration were (i) whether the accused persons were occupiers of the premises; (ii) as occupiers of the premises, whether they had custody and control of the drugs, thus invoking the presumption of possession and trafficking in s 37(d) and (da) respectively of the DDA 1952; (iii) whether there is a distinction between jointly charged with committing an offence under s 39B(1) of the DDA 1952 and jointly charged with committing an offence in furtherance of a common intention under s 34 of the Penal Code (FMS Cap 45); and (iv) whether the prosecution had a discretion in calling witnesses.

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Held, acquitting and discharging both the accused persons:

- (1) The general burden of proof lies throughout the trial on the prosecution to prove beyond a reasonable doubt the guilt of an accused for which he is charged. There is no similar burden on any accused person to prove his innocence. The evidential burden on him is merely to cast a reasonable doubt on the prosecution's case (see p 56I-57A); *Mohd Radhi bin Yaakob v PP* [1991] 3 MLJ 169 followed. A
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- (2) At the close of the prosecution's case, there must be a maximum evaluation of the prosecution's evidence. The court must be satisfied that the prosecution had proved all ingredients of the offence and made out a prima facie case beyond all reasonable doubt which if unrebutted would warrant a conviction (see p 56H); *Khoo Hi Chiang v PP* [1994] 1 MLJ 265 followed. C
- (3) To prove one or more of the ingredients of an offence the prosecution may rely on available statutory presumptions. Herein the defence will have a heavier burden, ie to rebut the particular statutory presumption relied on by the prosecution on a balance of probabilities as opposed to the general evidential burden to cast a reasonable doubt on the prima facie case. However even if an accused fails to rebut any presumption, the court, if left in a state of doubt whether the accused had committed the offence as alleged, must acquit the accused (see p 57B-C); *Yuvaraj v PP* [1969] 2 MLJ 217 followed. D
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- (4) As far as s 37(b) of the DDA 1952 in relation to the presumption of occupation of the premises is concerned, there is no legal presumption of care and management. Therefore to invoke the presumption of occupation of premises, care or management must be proved either by direct evidence or by inference (see p 57G). The mere presence of an accused in front of the house or in one or more of the rooms without more, does not show that an accused has or appears to have the care or management of the house and therefore the presumption under s 37(b) will not arise. However, a person proved to have the care or management of any premises is presumed to be an occupier, even without other proof of occupation of the premises in question (see p 58A-B). F
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- (5) In the present case, there was ample direct evidence to conclude that both the accused persons were occupiers of the bedroom ie (i) the furniture in the bedroom, the male and female wear in circumstances and conditions suggestive of recent human habitation; (ii) the passports and bank account books indicative of that habitation by both A1 and A2; (iii) A2's ownership of the house; and (iv) the presence of minors with the surname 'Sim'. Nonetheless, the evidence also pointed to A1 and A2 having the care or management of the house at the material time (see p 58C-E). H
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- A (6) There is no statutory definition of the word ‘possession’. However judicial pronouncements on its meaning illustrate that it involves a degree of custody or control, and knowledge of the custody or control. Whilst mere knowledge is insufficient to establish possession, the power of disposal is no longer an ingredient needed to support a conviction in a dangerous drugs trial (see p 58G–I); *Toh Ah Loh & Anor v R* [1949] MLJ 54, *Ho Seng Seng v R* [1951] MLJ 225, *Leow Ngee Lim v R* [1956] MLJ 28, *DPP v Brooks* [1974] AC 862, *PP v Lai Ah Bee* [1974] 2 MLJ 74, *PP v Badrulsham bin Baharom* [1988] 2 MLJ 585, *Gooi Loo Seng v PP* [1993] 2 MLJ 137, *PP v Ang Boo Boo* [1981] 1 MLJ 40 and *PP v Kau Joo Huat* [1988] 2 MLJ 91 followed.
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- (7) Custody means having care or guardianship and the knowledge of the existence and whereabouts of the goods and power of control over them, not amounting to possession. It is the actual physical control and control must be construed to mean any form of control other than actual physical control (see p 58I–59A); *Leow Ngee Lim v R* [1956] MLJ 28 and *Neo Koon Cheo v R* [1959] MLJ 47 followed.
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- (8) The facts in this case reflect the possibility of access by others to the bedroom which points to A1 not having exclusive use of the room. Notwithstanding that there was suspicion, it was inadequate for an inference that A1 had custody or control of the plastic bag containing drugs to attract the presumption under s 37(d) of the DDA 1952 (see p 59G–H).
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- (9) There is a distinction between cases where the accused persons are jointly charged with committing the same offence under s 170 of the Criminal Procedure Code (FMS Cap 6) (‘the CPC’) and where the accused persons are jointly charged with committing the offence in furtherance of a common intention under s 34 of the Penal Code (FMS Cap 6). In the case of the former, the prosecution need not show a common intention but must establish the guilt of each accused as a separate exercise and each may be convicted independently. Conversely in the case of the latter, the prosecution need only establish that one of the accused persons committed the act and that there is some evidence that the others participated in it in furtherance of a common intention (see p 59C–F); *PP v Muhamad Nasir v Shaharuddin* [1994] 2 MLJ 576 and *Shamsuddin bin Hassan & Anor v PP* [1991] 3 MLJ 314 followed.
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- I (10) The prosecution has a complete discretion as to the choice of its witnesses to be called at a trial, the only limitation being a duty to call all the necessary witnesses to establish against an accused proof beyond reasonable doubt. Where the witnesses come within the category of ‘witnesses essential to the unfolding

of the narratives on which the prosecution's case is based', then the prosecution must call such witnesses or at the very least offer them to the defence for cross-examination (see p 63A-C); *Ti Chuee Hiang v PP* [1995] 2 MLJ 433 followed.

[Bahasa Malaysia summary]

Kedua-dua tertuduh di dalam kes ini telah dituduh dengan kesalahan mengedar dadah di bawah s 39B Akta Dadah Berbahaya 1952 ('ADB 1952'). Pada masa penangkapannya, tertuduh pertama ('A1') merupakan orang yang tunggal yang dijumpai di dalam sebuah kereta di mana tiga bungkusan kertas yang mengandungi bahan bijian/debu berwarna jingga dijumpai bersama-sama dengan dua bungkusan plastik yang mengandungi bahan bijian/debu yang disyaki heroin. Kesemua bahan bijian/debu tersebut telah disimpan oleh pegawai polis ('SP3') yang mengetuai pasukan penangkap itu. Ketika pasukan penangkap bersama-sama dengan A1 telah bertolak ke sebuah rumah, mereka telah terjumpa tertuduh kedua ('A2') berdiri di luar rumah tersebut bersama-sama dengan seorang anak kecil. Apabila SP3 turun dari kereta A1, A2 telah bergegas masuk ke dalam rumah tersebut dan telah mengunci pintu gril besi depan dan dia juga telah menutup pintu bilik tidur depan. Seterusnya, A2 bersama-sama dengan anak-anaknya telah ditangkap. Di antara isu yang harus dipertimbangkan adalah (i) sama ada tertuduh adalah penduduk premis tersebut; (ii) sebagai penduduk premis tersebut, sama ada mereka mempunyai jagaan dan pengawalan dadah tersebut maka terpakainya anggapan posesi dan mengedar menurut s 37(d) dan (da) masing-masing di bawah ADB 1952; (iii) sama ada terdapatnya perbezaan di antara pertuduhan bersesama di bawah s 39B(1) dan pertuduhan bersesama dengan niat bersama di bawah s 34 Kanun Keseksaan (NMB Bab 45); dan (iv) sama ada pihak pendakwa mempunyai budibicara dalam memanggil saksi-saksi.

Diputuskan, membebaskan dan melepaskan kedua-dua tertuduh:

- (1) Pihak pendakwa memikul beban bukti am untuk membuktikan kesalahan tertuduh sepanjang perbicaraan, tanpa keraguan munasabah. Tidak ada beban yang sama yang dipikul oleh tertuduh untuk membuktikan ketidaksalahannya. Tertuduh hanya memikul beban keterangan untuk menunjukkan satu keraguan yang munasabah di dalam kes pihak pendakwa (lihat ms 56I-57A); *Mohd Radhi bin Yaakob v PP* [1991] 3 MLJ 169 diikuti.
- (2) Di penutup kes pihak pendakwa, penilaian maksimum terhadap keterangan pihak pendakwa haruslah diadakan. Mahkamah mesti berpuashati bahawa pihak pendakwa telah membuktikan kesemua unsur-unsur kesalahan tersebut dan telah membuktikan satu kes prima facie tanpa keraguan yang munasabah yang jika tidak disangkal akan menyokong suatu

- A sabitan bersalah (lihat ms 56H); *Khoo Hi Chiang v PP* [1994] 1 MLJ 265 diikuti.
- (3) Untuk membuktikan salah satu ataupun lebih dari satu unsur kesalahan tersebut, pihak pendakwa boleh bergantung kepada anggapan statutori yang sedia ada. Di sini, pihak pembelaan akan memikul beban yang lebih berat, iaitu untuk mematahkan anggapan statutori yang pihak pendakwa bergantung kepada, di atas imbangan kebarangkalian berbanding dengan beban keterangan yang am untuk menunjukkan satu keraguan munasabah dalam kes prima facie. Walau bagaimanapun jikalau tertuduh gagal mematahkan anggapan tersebut, mahkamah harus membebaskan tertuduh jika terdapat keraguan sama ada tertuduh telah melakukan kesalahan tersebut (lihat ms 57B–C); *Yuvaraj v PP* [1969] 2 MLJ 217 diikuti.
- C (4) Mengenai s 37(b) ADB 1952 berkenaan dengan anggapan pendudukan premis tersebut, tidak terdapat anggapan undang-undang yang berkenaan dengan penjagaan atau pengurusan. Untuk menimbulkan anggapan pendudukan premis, penjagaan atau pengurusan mesti dibuktikan melalui keterangan langsung ataupun melalui kesimpulan (lihat ms 57G). Kehadiran sahaja tertuduh di hadapan sebuah rumah atau di dalam satu ataupun lebih daripada bilik-bilik tanpa sebarang selanjutnya tidak menunjukkan bahawa tertuduh mempunyai penjagaan atau pengurusan rumah tersebut and anggapan di bawah s 37(b) tidak akan timbul. Walau bagaimanapun, seseorang yang dibuktikan mempunyai penjagaan atau pengurusan mana-mana premis akan dianggap sebagai seorang yang menduduki premis tersebut (lihat ms 58A–B).
- D (5) Di dalam kes ini, terdapat keterangan yang mencukupi untuk menyimpulkan bahawa kedua-dua tertuduh telah menduduki bilik tidur tersebut, iaitu (i) terdapat perabot di dalam bilik tidur itu dan pakaian lelaki dan perempuan dalam keadaan yang mencadangkan bahawa terdapatnya orang yang baru sahaja mendiami tempat tersebut; (ii) pasport-pasport dan buku-buku akaun bank yang mencadangkan pendudukan oleh kedua-dua A1 dan A2; (iii) pemunyaan rumah itu oleh A2; dan (iv) kehadiran kanak-kanak bawah umur yang mempunyai nama keluarga ‘Sim’. Namun demikian, keterangan juga menunjukkan bahawa A1 dan A2 mempunyai jagaan atau pengurusan terhadap rumah itu pada masa tersebut (lihat ms 58C–E).
- E (6) Tidak terdapat tafsiran statutori perkataan ‘milikan’. Walau bagaimanapun, tafsiran mahkamah mengenai maknanya menunjukkan bahawa ianya melibatkan jagaan atau kawalan, serta pengetahuan mengenai jagaan atau kawalan tersebut. Walaupun pengetahuan sahaja adalah tidak mencukupi untuk membuktikan pemilikan, kewujudan kuasa untuk mengendalikan dadah tersebut tidak lagi merupakan unsur
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- yang diperlukan untuk membuktikan hukuman dalam perbicaraan yang melibatkan dadah berbahaya (lihat ms 58G-I); *Toh Ah Loh & Anor v R* [1949] MLJ 54, *Ho Seng Seng v R* [1951] MLJ 225, *Leow Nghee Lim v R* [1956] MLJ 28, *DPP v Brooks* [1974] AC 862, *PP v Lai Ah Bee* [1974] 2 MLJ 74, *PP v Badrulsham bin Baharom* [1988] 2 MLJ 585, *Gooi Loo Seng v PP* [1993] 2 MLJ 137, *PP v Ang Boo Boo* [1981] 1 MLJ 40 dan *PP v Kau Joo Huat* [1988] 2 MLJ 91 diikuti. A
- (7) Jagaan bermakna pemeliharaan ataupun penjagaan dan pengetahuan mengenai kewujudan sesuatu benda dan di mana terletaknya benda tersebut dan kuasa pengawalan terhadapnya, yang tidak terjumlah kepada prmilikan. Ianya adalah kawalan fizikal sebenarnya dan kawalan haruslah dianggap sebagai mana-mana bentuk kawalan yang tidak termasuk kawalan fizikal sebenarnya (lihat ms 58I-59A); *Leow Nhgee Lim v R* [1956] MLJ 28 dan *Neo Koon Cheo v R* [1959] MLJ 47 diikuti. B
- (8) Fakta kes ini mencerminkan bahawa terdapatnya kemungkinan bahawa orang lain juga mempunyai akses kepada bilik tidur tersebut yang menunjukkan bahawa A1 bukanlah orang yang mempunyai penggunaan eksklusif bilik tersebut. Walaupun terdapat kesangsian, ini tidak mencukupi untuk membuat kesimpulan bahawa A1 mempunyai jagaan atau kawalan atas beg plastik yang mengandungi dadah, untuk menarik anggapan di bawah s 37(d) ADB 1952 (lihat ms 59G-H). C
- (9) Terdapat perbezaan di antara kes-kes di mana tertuduh dituduh bersama dengan melakukan kesalahan yang sama di bawah s 170 Kanun Acara Jenayah (NMB Bab 6) ('KAJ') dan kes-kes di mana tertuduh dituduh bersama dengan melakukan kesalahan berikutan dengan niat bersama di bawah s 34 Kanun Keseksaan (NMB Bab 45). Dalam kes yang pertama, pihak pendakwa tidak perlu menunjukkan niat bersama tetapi ianya mesti membuktikan kebersalahan setiap orang tertuduh sebagai gerak kerja yang berasingan dan setiap tertuduh itu boleh dihukum secara berasingan. Sebaliknya dalam kes kedua, pihak pendakwa hanya perlu membuktikan bahawa salah satu daripada tertuduh itu telah melakukan kesalahan tersebut dan bahawa terdapat keterangan yang menunjukkan bahawa tertuduh yang lain telah mengambil bahagian dalam melakukan kesalahan itu dengan niat bersama (lihat ms 59C-F); *PP v Muhamad Nasir v Shahrudin* [1994] 2 MLJ 576 dan *Shamsuddin bin Hassan & Anor v PP* [1991] 3 MLJ 314 diikuti. D
- (10) Pihak pendakwa mempunyai budi bicara yang sepenuhnya berkenaan dengan pemilihan saksi-saksinya yang akan dipanggil dalam perbicaraan, batasan tunggal adalah kewajipannya untuk memanggil kesemua saksi yang perlu untuk membuktikan satu kes terhadap tertuduh tanpa keraguan yang munasabah. Apabila saksi-saksi tersebut termasuk di dalam kategori yang mana E

- A saksi tersebut adalah ‘penting untuk menjelaskan fakta-fakta kea yang mana kes pihak pendakwa didasarkan’, maka pihak pendakwa mesti mamanggil saksi-saksi tersebut ataupun setidak-tidaknya menawarkan mereka kepada pihak pembelaan untuk pemeriksaan balas (lihat ms 63A–C); *Ti Chuee Hiang v PP* [1995] 2 MLJ 433 diikut.]
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Notes

For cases on standard of proof at the close of the prosecution’s case, see 7 *Mallal’s Digest* (4th Ed, 1995 Reissue) paras 1369–1371.

- C For a case on the standard of proof in rebutting statutory presumptions, see 7 *Mallal’s Digest* (4th Ed, 1995 Reissue) para 326.

For a case on the prosecution’s discretion in choice of witnesses, see 7 *Mallal’s Digest* (4th Ed, 1995 Reissue) para 1695.

D Cases referred to

- Abdullah Zawawi bin Yusoff v PP* [1993] 3 MLJ 1 (folld)
Chang Kim Siong v PP [1968] 1 MLJ 36 (refd)
Choo Chang Teik v PP [1991] 3 MLJ 423 (refd)
Choo Yoke Choy v PP [1992] 4 CLJ 1791 (folld)
- E *DPP v Brooks* [1974] AC 862 (refd)
Gooi Loo Seng v PP [1993] 2 MLJ 137 (refd)
Ho Seng Seng v R [1951] MLJ 225 (refd)
Jayaraman v PP [1982] 2 MLJ 306 (refd)
Khoo Hi Chiang v PP [1994] 1 MLJ 265 (folld)
Lee Chee Meng v PP [1992] 1 MLJ 322 (refd)
- F *Leow Nghee Lim v R* [1956] MLJ 28 (folld)
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169 (refd)
Neo Koon Cheo v R [1959] MLJ 47 (refd)
PP v Ang Boo Foo [1981] 1 MLJ 401 (refd)
PP v Bacho bin Samsudin [1994] 1 CLJ 143 (refd)
- G *PP v Badrulsham bin Baharom* [1988] 2 MLJ 585 (refd)
PP v Chee Kon Fatt [1991] 3 CLJ 2564 (folld)
PP v Kau Joo Huat [1988] 2 MLJ 91 (refd)
PP v Lai Ah Bee [1974] 2 MLJ 74 (refd)
PP v Lin Lian Chen [1992] 2 MLJ 561 (refd)
- H *PP v Muhamad Nasir bin Shaharuddin* [1994] 2 MLJ 576 (folld)
PP v Tan Ah Ling [1990] 2 CLJ 83 (refd)
R v Abbott [1955] 2 All ER 899 (folld)
R v Ashwell (1885) 16 QBD 190 (refd)
Seneviratne v R [1936] 3 All ER 36 (folld)
Shamsuddin bin Hassan & Anor v PP [1991] 3 MLJ 314 (refd)
- I *Sia Soon Suan v PP* [1966] 1 MLJ 116 (refd)
Tai Chai Keh v PP [1948–1949] MLJ Supp 105 (refd)
Ti Chuee Hiang v PP [1995] 2 MLJ 433 (refd)
Toh Ah Loh & Anor v R [1949] MLJ 54 (refd)

Yuvaraj v PP [1969] 2 MLJ 217 (refd)

A

Legislation referred to

Criminal Procedure Code (FMS Cap 6) s 170

Evidence Act 1950 s 15

Penal Code (FMS Cap 45) s 34

B

Hassan Abdul Ghani (Deputy Public Prosecutor) for the Public Prosecutor.
V Sithambaram (Kumar Sitham & Partners) for the accused.

Jeffrey Tan JC: The charge against both accused persons reads as follows:

C

Bahawa kamu bersama-sama pada 2 September 1993, jam lebih kurang 7 petang, di rumah No 3180 Samagahah, Permatang Pauh, dalam Daerah Butterworth di Negeri Pulau Pinang, telah mengedar dadah berbahaya, iaitu heroin seberat 50.2g dan dengan itu kamu telah melakukan satu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah s 39B(2) Akta Dadah Berbahaya.

D

The prosecution's evidence may be summarized as follows:

At 6.15pm on 2 September 1993, at Jalan Bagan Lalang, Butterworth, a police party headed by a police officer ('SP3') arrested the first accused ('A1'). At the time of the arrest, A1 was at the driver's seat, being the sole occupant in a stationary car bearing registration no PAW 4919 ('the car'). Found inside the car were three paper packages, and in each paper package was a plastic packet containing orange granular/powdery substance. Also found in the car was one other packet with the marking 'Essence of Tienchi' with two plastic packets, each containing granular/powdery substance. The granular/ powdery substance was suspected to be heroin. All granular/powdery substances were then taken into custody by SP3 who kept it inside the pocket of his trousers.

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The arrest party, with A1 in trail, then proceeded to a house no 3180 Samagahah, Permatang Pauh, Butterworth ('the house') in SP3 and A1's cars. Arriving at the house, the arrest party saw the second accused ('A2') and a young child outside. When SP3 alighted from A1's car, A2 immediately got into the house, locked the front iron grill door and closed the front bedroom door. A2 however left the front wooden door open. Two members of the arrest party stood guard over A1, while SP3 and another police officer ('SP6') made a beeline to the back of the house. On reaching the back of the house, SP3 and SP6 found the back door ajar. They entered the house and found A2 in the hall clutching a bunch of keys (exh P11). SP3 asked A2 several times to open the front grill door, but A2 did not comply. SP3 then identified himself whereupon A2 opened the front grill door, and A1 was escorted into the house. SP3 then requested A2 to open the front bedroom door, but failing to have her co-operation despite several requests, SP3 then kicked open the front bedroom door.

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In that front bedroom was a cupboard containing both adult male and female clothing, a double mattress, and a writing desk (see exh P10). On top of the writing desk was a cardboard box with the marking 'Cintan

- A Mee' (exh P3A) which SP3 opened and found in it four plastic bags (exhs P3B1-P3B4) with orange granular/powdery substance (exhs P3C1-P3C4) suspected to be heroin.

Inside the top drawer of the writing desk were the international passports of A1 and A2 (exhs P13A & P13B), gold jewellery, and 11 bank account books (exhs P14A-P14K).

- B Inside the bottom drawer of the writing desk were found:
- (1) two 'karung plastik' (exhs P6B1-P6B2) containing orange granular/powdery substance (exhs P6E1-P6E2) suspected to be heroin;
 - (2) two other packets (exhs P5B3 and P6B4) containing orange granular/powdery substance (exhs P6E3-P6E4) also suspected to be heroin;
 - (3) numerous empty plastic packets (counted in court as 155 packets) (exhs P6D1-P6D155);
 - (4) a small weighing scale (exh P7);
 - (5) a lock (exh P8); and
 - (6) a metal spoon.

A search of the house and its vicinity unravelled no other incriminating articles or substances.

- E A2 and her three children (of ages 2 to 14) were then arrested. SP3 took custody of all articles recovered from the bedroom which he placed inside the bottom drawer of the writing desk. At 10.10pm on 2 September 1993, SP3 lodged two separate police reports, namely 3675/93 (exh D12) relating to the arrest at the house and Butterworth report 5555/93 pertaining to the arrest at the car. At his office SP3 marked all exhibits recovered from both the car and the house with the markings of (i) SP3's initials; and
- F (ii) the date '2 September 1993'. The exhibits recovered from the car were then handed to the investigation officer ('SP7') at 10pm on 2 September 1993, while the exhibits recovered from the house were handed to SP7, half an hour later at 10.30pm on 2 September 1993.

- G It was explained by SP3 that on the way back to his office after the arrest of A2, the exhibits recovered from the car were in the pocket of his trousers while the exhibits recovered from the house were placed inside the drawer and the box. SP3 further explained that upon reaching his office he placed the drawer and box with their contents on top of his desk. The exhibits in the pocket of his trousers however were not removed. When he
- H handed the exhibits recovered from the house to SP7, the exhibits from the car were yet in the pocket of his trousers.

- I SP7 marked the box as 'E' (exh P3A) and the plastic packets inside as 'E1'-'E4' (exhs P3B1-P3B4), the drawer as 'F' (exh P6A), and the articles inside the drawer as 'F1'-'F9' (exhs P6B1-P6B4, P6C1 and P6C2, P6D1-P6D155, P6E1-P6E4, P7, P8 and P9). Punctiliously, SP7 marked on each of the exhibits with the following:

- (1) 'Peraí police report no 3676/93';
- (2) 'IP no 1979/93';

- (3) his initials; and
(4) the date '2 September 1993'.

Having done so he kept all exhibits in a locked steel cabinet until it was handed to a chemist for analysis.

SP7 further testified that on two separate occasions (3 and 5 September 1993) he carried out investigations in the house and found that the lock to the door of the bedroom was not functional — ie it could not be locked nor could any key in exh P11 be used to lock or unlock the door. On the second occasion (5 September 1993) SP7 said that he removed some clothing of male wear (exhs P15A–P15D) and female wear (exhs P16A–P16F) found in the cupboard in the bedroom.

The exhibits recovered from the car at 6.15pm however were not produced, and there was a total absence of evidence on the identity and weight of the orange granular/powdery substance contained in the five packets.

The chemist ('SP1') who analysed the drug exhibits gave the following evidence:

- (1) 'E1', a plastic packet containing 238.4g of pinkish granular/powdery substance which he analysed and found to contain 15.9g of heroin;
- (2) 'E2', a plastic packet containing 236.5g of pinkish granular/powdery substance which he analysed and found to contain traces of heroin;
- (3) 'E3', a plastic packet containing 239.7g of pinkish granular/powdery substance which he analysed and found to contain 16.2g of heroin;
- (4) 'E4', a plastic packet containing 238.1g of pinkish granular/powdery substance which he analysed and found to contain 17.1g of heroin;
- (5) 'F1', a plastic packet containing 201g of pinkish granular/powdery substance which he analysed and found to contain traces of heroin;
- (6) 'F2', a plastic packet containing 168.9g of pinkish granular/powdery substance which he analysed and found to contain traces of heroin;
- (7) 'F3', a plastic packet containing 8.1g of orange granular/powdery substance which he analysed and found to contain 0.5g of heroin;
- (8) 'F4', a plastic packet containing 8.1g of orange granular/powdery substance which he analysed and found to contain 0.5g of heroin.

At the close of the prosecution's case, the defence submitted that there was no case to answer, and duly reminded the court of a need for a maximum evaluation of the prosecution's evidence, ie the court has to be satisfied that the prosecution has proved all ingredients of the offence and has made out a prima facie case beyond a reasonable doubt which if unrebutted would warrant the accused person's conviction (see *Khoo Hi Chiang v PP* [1994] 1 MLJ 265).

That statement of law by the Supreme Court must be juxtaposed with the fundamental principle of Malaysian criminal law that the general burden of proof lies throughout the trial on the prosecution to prove

A beyond a reasonable doubt the guilt of an accused for which he is charged. There is no similar burden on the accused to prove his innocence; the evidential burden on him is merely to cast a reasonable doubt in the prosecution's case (see *Mohamad Radhi bin Yaakob v PP* [1991] 3 MLJ 169).

B To prove one or more of the ingredients of an offence, the prosecution may rely on available statutory presumptions. When that occurs the defence will have a heavier burden, ie, to rebut the particular statutory presumption relied on by the prosecution on a balance of probabilities (*Yuvaraj v PP* [1969] 2 MLJ 217), as opposed to the general evidential burden to cast a reasonable doubt in the prima facie case. However even if an accused fails to rebut any presumption, the court, if left in a state of doubt whether the accused had committed the offence as alleged, must yet acquit the accused.

C On the statutory presumption of possession under s 37(d), the Supreme Court in *Choo Yoke Choy v PP* [1992] 4 CLJ 1791, per Anuar J (as he then was) said at p 1795:

D It was accordingly held that there was no evidence of custody or control of the drugs to raise the presumption under s 37(d) of the Act that the appellants were in possession of the drugs and the further presumption that they must have known that the drugs were cannabis. Unless this can be proved, the presumption under s 37(da) of the Act that the appellants were trafficking in drugs did not arise.

E That enunciation of the Supreme Court was on s 37(d) of the Dangerous Drugs Act 1952 ('the DDA 1952'). However the principle that there must foremost be the basic/primary facts or a pre-existent presumption for a particular presumption or further presumption to materialize, applies generally to all presumptions in relation to s 37 of the DDA 1952.

F The prosecution claimed that it had proved the primary facts for the invocation of the statutory presumptions under ss 37(b), 37(d) and 37(da) of the DDA 1952, and that the presumed facts as the supplementary evidence realized the prima facie case against the accused, which if un rebutted, would warrant the conviction of both the accused persons.

G The court will leave aside for the moment the pair of related presumptions under s 37(d) and (da), being closer to the charge — and address instead the presumption under s 37(b) of the DDA 1952. There is no legal presumption of care or management, and to invoke the presumption under s 37(b), care or management must be proved either by

H direct evidence or by inference.

I The evidence adduced was that sometime in the 1980's one Tan Poh Luang ('SP5') sold the house to A2. At the material time of the raid, A2 was the sole adult in the house, the other three being minors with the surname 'Sim'. The international passports of A1 and A2, and 11 bank account books (one in A1's name, nine in A2's name and one in A1 and A2's joint names) were found in the top drawer of a writing desk in the bedroom. There was a cupboard in the bedroom with male and female wear, and a double mattress.

The mere presence of an accused in front of the house or in one or more of the rooms without more, does not show that the accused has or appears to have the care and management of the house. Therefore the presumption under s 37(b) of the DDA 1952 will not arise (see *Lai Ah Bee v PP* [1974] 2 MLJ 74, per Chang Min Tat J at p 75). However, a person proven to have the care or management of any premises is presumed to be an occupier, even without other proof of occupation of the premises in question. That presumption, as are all legal presumptions, is but a legal device to draw and infer facts upon proof of certain required basic facts; but it does not necessary follow that a fact presumable on proof of basic facts is not provable by direct evidence, that is without any recourse to the indirect and circuitous course of proving the primary facts for an invocation of a presumption of a fact. In the instant case, there were more evidence than mere presence, ie there were:

- (1) the furniture in the bedroom, the male and female wear in circumstances and conditions suggestive of recent human habitation;
- (2) the passports and bank account books indicative of habitation by A1 and A2;
- (3) A2's ownership of the house; and
- (4) the presence of minors with the surname 'Sim'

There was therefore ample direct evidence to deduce that both A1 and A2 were occupiers of the bedroom. Nonetheless, the evidence pointed unmistakably to A1 and A2 as having the care or management of the house at the material time.

On the basis that there was sufficient proof of A1 and A2's occupancy of the house and bedroom, the prosecution asserted that A1 and A2 *qua* occupiers had custody and control of the incriminating articles in the bedroom, and submitted that with custody and control, the chain of presumptions under ss 37(d) and (da) were set into motion, in that A1 and A2 were in possession, albeit jointly, of 50.2g of heroin, a weight sufficient for the charge of trafficking a dangerous drug.

There is no statutory definition of possession, but it is a word variously said to be enigmatic and vague. However, judicial pronouncements on its meaning include invariably some degree of custody or control, and knowledge of the custody or control (see *Toh Ah Loh & Anor v R* [1949] MLJ 54, *Ho Seng Seng v R* [1951] MLJ 225, *Leow Nghee Lim v R* [1956] MLJ 28, *DPP v Brooks* [1974] AC 862, *PP v Lai Ah Bee* [1974] 2 MLJ 74 and *PP v Badrulsham bin Baharom* [1988] 2 MLJ 585). However 'a man has not possession of that of the existence of which he is unaware', per Cave J in *R v Ashwell* (1885) 16 QBD 190 at p 201. Mere knowledge however is not sufficient to establish possession (see *Gooi Loo Seng v PP* [1993] 2 MLJ 137), but the power of disposal (see *PP v Ang Boo Foo* [1981] 1 MLJ 40) is no longer an ingredient needed to support a conviction in a dangerous drugs trial (see *PP v Kau Joo Huat* [1988] 2 MLJ 91).

In *Leow Nghee Lim v R* [1956] MLJ 28, Taylor J explained the meaning of custody 'as having care or guardianship ... knowledge of the

A existence and whereabouts of the goods and power of control over them, not amounting to possession', while Ambrose J in *Neo Koon Cheo v R* [1959] MLJ 47 explained that 'custody is actual physical control and control must be construed to mean any form of control other than actual physical control'.

B Before proceeding further it is desirable to reflect on the charge which reads that at 7pm on 2 September 1993 both accused persons were jointly charged with trafficking in a dangerous drug, namely heroin of 50.2g in weight, at house No 3180, Samagagah, Permatang Pauh.

C Both the accused persons were therefore jointly charged with committing the same offence, *but not jointly charged* with committing the offence under s 39B(1) of the DDA 1952 in furtherance of a common intention under s 34 of the Penal Code (FMS Cap 45). That distinction was highlighted by Visu Sinnadurai J in *PP v Muhamad Nasir bin Shaharuddin* [1994] 2 MLJ 576 as important, for according to the learned judge it has significant effect on the guilt or otherwise of one accused and as to how it affects the other accused. The pith of the learned judge's assessment on the law relating to s 34 of the Penal Code (FMS Cap 45) and s 170 of the Criminal Procedure Code (FMS Cap 6) ('the CPC'), and subscribed to by this court, is that where two or more persons are jointly charged pursuant to s 170 of the CPC, the prosecution need not show a common intention but must establish the guilt of each accused person as a separate exercise, and each may be convicted independently; conversely in cases of common intention, the prosecution has only to establish that one of the accused persons committed the act and that others participated in it in furtherance of a common intention. In *Shamsuddin bin Hassan & Anor v PP* [1991] 3 MLJ 314, the Supreme Court held there must be some evidence of common intention.

F Although it is this court's finding that both A1 and A2 were occupiers of the bedroom where drugs were found, yet that finding begs the question of whether each accused had thereby custody or control of the 50.2g of heroin.

G It is undeniable that both A1 and A2 were not found in actual physical possession of the drugs, a point that will be addressed later *in extenso*. However, as occupiers it is presumed that each had unhindered access to the bedroom, although not amounting to exclusive use as to exclude the other accused person. The possibility of access to the bedroom by others was not established, but it was candidly admitted by the investigation officer that he was not aware of the number of occupants in the house, an admission not consonant with 'the onus not on the defence to prove possibility of access by others but on the prosecution to exclude such possibility', per Edgar Joseph Jr SCJ in *Abdullah Zawawi bin Yusoff v PP* [1993] 3 MLJ 1 at p 7.

I There are a number of decisions (*Gooi Loo Seng v PP* [1993] 2 MLJ 137, *Lee Chee Meng v PP* [1992] 1 MLJ 322 and *Abdullah Zawawi bin Yusoff*) highly illuminative of the Supreme Court's reception of an accused person's defence of access by others and loss of exclusive possession of

premises in which drugs were found. However the background facts of two High Court decisions bear a remarkable similarity to the instant case.

In *PP v Tan Ah Ling* [1990] 2 CLJ 83 the facts adduced were that a police party stopped a car driven by the accused and brought him to his house. The accused person's wife was in the house. The police made a search and in the presence of the accused and his wife found slabs of raw opium in the kitchen area. It was held that the essential element to be established against the accused was his possession of the raw opium found in the house. However at the time of recovery the accused person's wife was the only adult in physical possession of the premises and was the only person who appeared at the material time to have the custody and control of the raw opium.

The facts in *PP v Bacho bin Samsudin* [1994] 1 CLJ 143 are not much different. In that case the accused was stopped by police at a road junction near his home and taken to his room where five envelopes containing cannabis were found. The accused shared the house with several family members who had access to the accused person's room although the room was sometimes locked by the accused. The trial court held that the accused did not have exclusive use of the room and in the absence of any evidence of the accused person's finger prints on the envelopes and the period of time the room remained locked, it could not be inferred that the accused had custody or control of the incriminating envelopes.

In relation to the facts of the instant case, A1 was arrested and handcuffed at 6.15pm and he was thereafter under lawful restraint. That evidence at the initial stages of the prosecution's case had an immediate but baffling impact, for it was strange how it could have been possible for A1, then in legal custody, to have committed the offence of trafficking at 7pm as alleged. A1 was not found in physical possession of the drugs produced in court but was at the time of his arrest far removed from the drugs in question. He was shanghaied to the house, and his presence in the house during the discovery of the drugs was entirely involuntary. The only adult in apparent possession of the house and bedroom was A2 who also appeared to have custody and control of the drugs at the material time at 7pm.

Perhaps the events during the discovery of the drugs should not be looked at in isolation, as it could have been possible for A1 to have had the exclusive occupation of the bedroom at the material time. In relation to A1's exclusive occupation and the possibility of access to the bedroom by others, the court considered the following evidence. When the arrest party arrived at the house, A2 was seen rushing into the house and closing the bedroom door, and that unquestionably established that at 7pm and at the very least just before the arrival of the arrest party, the bedroom door was not closed. It was also gathered, being more probable that not, that at 7pm, the back door of the house was open. A2 was not seen going to the back portion of the house by members of the arrest party guarding at the front of the house, for SP3 and SP6 who rushed to the back of the house found the back door open. The keys to the house or bedroom were not

A found on A1. Whether A1 was the last person in the house and whether in his absence another person had entered the room was not established. Undoubtedly at 7pm drugs were found in the bedroom. However it could not be inferred from that discovery alone that the drugs in question were in the bedroom when A1 left the bedroom and the house. Under the
B circumstances where the bedroom door and backdoor were both open, and access was not barred to A2, the drugs might well have been deposited in the bedroom after A1 had left the house and/or just before the arrival of the arrest party, and without A1's knowledge.

The condition of the lock of the bedroom door was also not helpful to the prosecution's case. The investigation officer found that the lock of
C the door was spoilt. He tested the lock but none of the keys in exh P11 could lock or unlock the door. SP3 who kicked open the door did not attempt beforehand to check if the door was locked, and therefore such evidence to show whether the door was locked when it was kicked open was irrevocably lost. That being so, it must be inferred that the lock of the
D bedroom door was not functional when the door was kicked open.

The above evidence therefore reflected the possibility of access by others and amounted to A1 having less than exclusive use of the bedroom, before and at the material time the drugs were found. There was suspicion; but then however grave, it was totally inadequate for an inference of A1's custody and control of the plastic bag containing the drugs to attract the
E presumption under s 37(d) of the DDA 1952. At best there was circumstantial evidence, but with gaps that did not point irresistibly to A1's guilt (*Chang Kim Siong v PP* [1968] 1 MLJ 36, *Jayaraman v PP* [1982] 2 MLJ 306 and *PP v Lin Lian Chen* [1992] 2 MLJ 561).

The prosecution did attempt to persuade the court that the presence
F of orange granular/powdery substance in the car must necessarily denote that the presence of drugs in the house was not accidental. However that submission was entirely inadequate. The identity of the granular/powdery substance found in the car was never established, and giving A1 the most favourable inference from the set of facts (see *Tai Chai Keh v PP* [1948–1949] MLJ Supp 105), it might as well have been a harmless substance. As
G a harmless substance, the events relating to the car and the house were not similar occurrences, and neither could the events of the car and house fit into the illustrations in s 15 of the Evidence Act 1950.

As for A2, she was the sole adult in physical occupation of the house and apparently having the custody and control of the drugs in the bedroom.
H Her apparent physical possession of the house was evident from her presence in the house and physical possession of exh P11 to the house. She was seen locking the main grill door and closing the bedroom door, and although she opened the main iron grill door, she refused to comply with the requests of SP3, whose identity was made known to her, to open the bedroom door.
I According to SP3 he could not forcibly take the keys from A2 and therefore had to kick open the door. Alas, that act of force while finesse might have been more in order, put paid to the chance of knowing that the door was locked before it was kicked open. Her refusal to open the bedroom door at

the request of SP3, and her earlier conduct in locking the main door and closing the bedroom door, pointed only to one direction, namely, her guilty knowledge of drugs in her bedroom. A

Yet as recognized earlier, knowledge alone is insufficient proof of custody or control; there must be the accompanying evidence of custody or control. A2's passport and bank account books were found in the top drawer of a writing desk in the bedroom occupied by her. It was deduced that A2 as an occupier must have slept in the room, and may indeed have entered the room immediately before the raid. However those deductions, not improbable nor unreasonable, were yet short of the necessary proof of custody or control. The only incriminating evidence against her was her presence in the house, and knowledge of drugs in the room which she occupied with A1. A1 had no exclusive use of the bedroom. Equally A2's use of the bedroom was subject to A1's unhindered access and her guilty knowledge, and even her acquiescence to the presence of drugs in the bedroom without more, was but one element of custody and control. B C

When the prosecution adduced the evidence of the arrest of A1 (as it must), and the discovery of granular/powdery substance in the car all tending to show A1's commission of another offence, the probative value of that evidence was measured against its prejudicial effect against both accused persons. The fear of any such prejudice was however unnecessary, as the identity of the substance found in the car was not established. However the probative value of that evidence, giving the best inference to A2 by linking the substance in the car to the substance in the bedroom, did not amount to A2's custody or control of the drugs in the bedroom, as it might well have been argued for her that on the evidence adduced, it was more probable that A1 had the sole custody and control of the drugs. D E

In a situation of a doubt as to which accused person is guilty, the course adopted is summarized in the often quoted words of Lord Goddard in *R v Abbott* [1955] 2 All ER 899 at p 901: F

... If two people are jointly indicted for the commission of crime and the evidence does not point to one rather than the other, and there is no evidence that they were acting in concert, the jury ought to return a verdict of not guilty against both because the prosecution have not proved the case. If, in those circumstances, it were left to the defendant to get out of it if they could, that would put the onus on the defendants to prove themselves not guilty. Fennimore J remembers a case in which two sisters were indicted for murder, and there was evidence that they had both been in the room at the time the murder of the boy was committed; but the prosecution could not show that sister A had committed the offence or that sister B had committed the offence. Very likely one or the other must have committed it, but there was no evidence which, and although it is unfortunate that a guilty party cannot be brought to justice, it is far more important that there should not be a miscarriage of justice and that the law should be maintained that the prosecution should prove the case... G H I

Those words were cited with approval in *Shamsuddin bin Hassan & Anor v PP* [1991] 3 MLJ 314, where the Supreme Court, in a textbook situation as to which one of two occupants in a car had thrown out a bundle

- A containing drugs, and in the absence of evidence of common intention, allowed both appellants' appeal against their conviction.

One procedural and one investigative measure if only taken, might have overcome some of the infirmities in the prosecution's case. It is not denied that the prosecution has a complete discretion as to the choice of its witnesses to be called at a trial, the only limitation being a duty to call all the necessary witnesses to establish against an accused, proof beyond a reasonable doubt. Where witnesses come within the category of 'witnesses essential to the unfolding of the narratives on which the prosecution's case is based' then the prosecution must call such witnesses or at the very least offer them for cross-examination by the defence (see *Ti Chuee Hiang v PP* [1995] 2 MLJ 433). In the words of Lord Roche when delivering the advice of the Privy Council in an appeal from Ceylon (now Sri Lanka) in *Seneviratne v R* [1936] 3 All ER 36 at p 49:

- ... Witnesses essential to the unfolding of the narratives upon which the prosecution is based must, of course, be called by the prosecution, whether in the result the effect of their testimony is for or against the case for the prosecution.
- D

- Both Sim Phoi Yong (16 years) and Sim Phoi Seen (14 years) were present in the house at the material time and arrested along with A2. They could have provided information about the number of occupants in the house, the occupants of the bedroom, and who had access. They were not shown as hostile witnesses and their testimony could have excluded the possibility or improbability of access by others — to borrow the words of Edgar Joseph Jr J (as he then was) in *PP v Chee Kon Fatt* [1991] 3 CLJ 2564, ie testimony that 'could scarcely be considered unnecessary'. They were 'essential witnesses' in the narrative of the prosecution's case, but the prosecution's failure to call them or at the very least to offer them to the defence for cross-examination, and in default, to have explained why they were not called as witnesses, left a gap in the prosecution's case in the end. The prosecution's offer of those 'essential witnesses' to the defence as defence witnesses was yet insufficient to fill in that gap (see *Ti Chuee Hiang v PP*) as the onus upon it to exclude the possibility of access by others was not discharged.
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- It is said that an examination for finger prints is sometimes necessary (see *PP v Lin Lian Chen* [1992] 2 MLJ 561, *PP v Chee Kon Fatt* and *PP v Bacho bin Samsudin* [1994] 1 CLJ 143) and in the instant case, the presence or absence of finger prints on the plastic bags containing the drugs would have either excluded handling by one or both of the accused persons. Admittedly, physical handling is not essential to prove custody or control, but unlike the 'famed sisters' situation cited in *R v Abbott* [1955] 2 All ER 899, an examination for finger prints would go some way towards proof of custody or control by either or indeed both the accused persons.
- H
- I In its absence the courts were left to speculate on less than best evidence (see *PP v Chee Kon Fatt* [1992] 3 CLJ 2564).

This is a trial of an offence involving capital punishment and evidence by inference alone is not enough to support a conviction without the

element of control (see *Choo Chang Teik v PP* [1991] 3 MLJ 423). In the instant case the court was impliedly asked to do exactly what is not permitted, to infer (i) that A1 was a drug dealer (the evidence of the arrest at the car) and had custody or control of the drugs in the bedroom; and (ii) that A2 had custody or control of the drugs as she occupied the bedroom together with A1 and was present in the house. However, the requirements of strict proof in a criminal case cannot be relaxed to bridge any material gap in the prosecution's evidence. Irrespective of whether the court is convinced in its mind of the guilt or innocence of an accused, its decision must be based on the evidence adduced and nothing else (see *Sia Soon Suan v PP* [1966] 1 MLJ 116).

However, nothing could repair the damage to the prosecution's case in the following instances:

- (1) The obvious difference in the description of the exhibits — ie the arrest party said they recovered orange substances while the chemist examined pink substances, and produced in court were both orange and pink substances;
- (2) The neglect of the prosecution's witnesses to identify specifically the plastic packets found in the box and the packets found in the drawer. In the neglect, the court was left to its own devices to deduce that the plastic bags were found in the bags and in the drawer — but which the court declined so to do in the trial involving a capital offence; and
- (3) The contradiction in the evidence of SP3. At the initial stages of his testimony, SP3 said he handed the exhibits (the suspected drugs) recovered from the car to SP7 at 10pm on 2 September 1993 — where he said that when he handed the exhibits recovered from the house to SP7 at 10.30pm on 2 September 1993, the exhibits recovered from the car were in the pocket of his trousers, evidence that was in conflict with his earlier testimony that the exhibits recovered from the car were handed to SP7 half an hour earlier.

This court therefore finds, at the close of the prosecution case, that the prosecution has failed to make out a *prima facie* case. Both accused persons are therefore acquitted and discharged.

Accused acquitted and discharged.

Reported by T Vimalavathy

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